



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 306 OF 2010

RURAL DISTRIBUTORS ENTERPRISES LIMITED.....
.... PLAINTIFF

VERSUS

KENYA POWER AND LIGHTING COMPANY LIMITED.....
DEFENDANT

RULING

By its Notice of Motion dated 20th October, 2010, the Plaintiff has applied under order XXXV Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for summary judgment against the Defendant as prayed for in the Plaint. Judgment is sought for US\$345,830.00 equivalent to Kshs.26,974,740.00 together with interest.

The application is supported by the Verifying and Supplementary Affidavits of Mohamed Abdi Osman sworn on 28th October, 2010 and 21st March, 2011, respectively.

The Plaintiffs case is that by a contract made on 14th March, 2007, the Plaintiff was awarded a tender No. KPLC/1C/5/3/57/06 For the supply of treated wood poles (hereinafter “poles”) for a sum of US Dollars 2,600,000/- exclusive of tax, that the Plaintiff did supply the said poles whereby the Defendant had only paid US\$2,254,170, that between July, 2008 and August, 2008 the Plaintiff supplied a total of 1,766 poles being the last batch under the contract for which the Defendant had failed to pay US\$345,830.00 at the exchange rate of 1US\$ =Kshs.78 as at May, 2010. That is what constituted the Plaintiff’s claim in the suit.

The Defendant filed a Replying Affidavit sworn by Beatrice Muendo on 29th March, 2010. She swore that the Plaintiff had breached its contract with the Defendant in that it had failed to supply the poles as contracted, that the Plaintiff had delayed the delivery of the poles as contracted and that the Plaintiff had engaged in fraud, deceit and outright theft against the Defendant. That the Defendant had discovered that the Plaintiff had colluded with the Defendant’s storekeepers and had collected the Defendant’s poles from one store in the country and delivered the same to another of the Defendant’s stores. The Defendant produced copies of searches from the Kenya Revenue Authority’s Motor Vehicle Registration Department to show that some of the motor vehicles which allegedly delivered the subject poles were station wagons, motor cycles, Toyota Saloon and Toyota Vans which ordinarily cannot carry any of the poles as alleged by the Plaintiff. The Defendant therefore contended that it had a good defence on merit.

I have considered the Affidavits on record and the submissions of Counsel.

In BULLEN & LEAKE and JACOB'S PRECEDENTS OF PLEADINGS 12th Ed. Page 138 150 especially page 140 which states:

“The summary procedure under this rule can only be adopted when it can be clearly seen that a claim or answer is on the face of it ‘obviously unsustainable’ or where the case is clearly beyond doubt or the case is unarguable. A pleading will not be struck out under this Rule ‘unless it is demurrable and something worse than demurrable’ such that no legitimate amendment can save it from being demurrable. The court must be satisfied that there is no reasonable cause of action or that the proceedings are frivolous or vexatious or that the defences raised are not arguable.”

In HALSBURY'S LAWS OF ENGLAND 4th Ed. Vol.37 paragraph 14:

“the Defendant does not have to show a complete defence but only fair probability of a defence or that there is a real substantial issue or question to be tried or that there was dispute and facts which raises a reasonable doubt whether the Plaintiff is entitled to judgment.”

PROVINCIAL INSURANCE CO. OF EAST AFRICA Vs LENNY M. KIVUTI 216 of 1996 unreported. At page 3 the following principle is covered:

“In an application for summary judgment even one triable issue, if bonafide, would entitle the Defendant to have unconditional leave to defend. See KUNDANLAL RESTAURANT – Vs – DEVSHI & COMPANY (1952) 19 E.A.C.A. 77.”

HARMAN –VS- BANGUE DU CONGO BELGE (1938) 5 E.A.CA.89

SHAH V PANDAMSHI (1984) KLR 532

Holding No.5

“In dealing with the application for summary judgment, if a triable issue is found to exist, the court must order a trial even if the court strongly feels that the Defendant is unlikely to succeed at the trial.”

SUNDERJ V CLYDE HOUSE COMPANY LTD (1984) KLR 499

HELD:-

1. An application for summary judgment under Order 35 of the Civil Procedure Rules should not be allowed where pleadings and Affidavits disclose bona fide triable issues of fact and law.

2. Where an issue is raised which requires reference to applicable case law in order to reach a decision, such an issue should be tried with full argument on the law and should not be dealt with summarily.

D.T. DOBIE & CO. LTD V JOSEPH MBARIA MUCHINA –V- LEAH WANJIKU MBUGUA C.A. 37 of 1978 unreported at page 7 – WENLOCK V MALONEY & OTHERS (1965) 1 W.L.R. 1238 at page 1242.

“This summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts of the case in order to see whether the Plaintiff really has a cause of action. To do that is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power.”

At page 1244 per DAN KWERTS L J ibid at page 1244

“The power to strike out any pleading or any part of a pleading under this rule is not mandatory but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading.”

The principles applicable in an application for summary judgment are therefore well settled. That where the Defendant has no triable issues or where the Defence is a sham the Plaintiff is entitled to judgment at once. That where there is some semblance of defence to the Plaintiff’s claim a Defendant will be entitled to conditional leave to defend. But where the Defence discloses any reasonable triable issue even if one, the Defendant is entitled to unconditional leave to defend the claim.

I have noted from the record that subsequent to the filing of the present application, the Defendant did apply and was allowed to file on 4th March, 2011 an Amended Defence.

It is not denied that there was a contract in force for the delivery of poles valued at US\$2,600,000 by the Plaintiff to the Defendant. It is also not denied that a total sum of US\$2,254,170 equivalent to Kshs. 175,825,260/- has been paid by the Defendant to the Plaintiff but of which the Defendant has contended that a sum of Kshs.25,714,000/- had been wrongly paid as there was no delivery of poles for the same. Indeed the Defendant did amend its Defence and counterclaimed the said sum. The record shows that the Defendant did apply for judgment in the counterclaim which was entered on 6th April, 2011.

Having examined the evidence on record, I note that the Plaintiff’s claim is for deliveries made between July and August 2008. I have noted from “BM1” produced by the Defendant that some of the July and August, 2008 deliveries were made by motor vehicle registration Nos.KAU 760T, KAU 256T, KAU 316Y and KAT 461L which the Defendant has claimed to be station wagons and Toyota Van which are incapable of carrying any of the poles. This is so considering that these poles vary in sizes of between 10 and 12 metres in length. In “MAO -3”, the Plaintiff exhibited Delivery Note Nos.1193 and 1198 which were in respect of motor vehicle registration Nos. KAT 450X and KAT 461L which the Defendant allege to be an Isuzu bus and station wagon, respectively. The Plaintiff did not contradict the Defendant’s assertions regarding the Plaintiff delivery notes and the subject motor vehicles as being vehicles incapable of ferrying poles by their very nature.

The Plaintiff however did produce copies of records from the Registrar of Motor Vehicles which showed that nine (9) of the vehicles that made the subject deliveries of July-August, 2008 were lorries or Trucks which indeed are capable of ferrying such poles.

In the Amended Defence, the Defendant has pleaded that the Plaintiff had breached the contract with the Defendant in failing to make actual deliveries of the contracted poles to the Defendant, in delivering unsuitable poles against contracted terms and in purporting to deliver the Defendant’s own poles to the Defendant. The Defendant did charge the Plaintiff with alleged fraudulent activities with the Defendant’s own personnel whereby the Defendant not only counterclaimed Kshs.25,714,000/- for which, as I have stated, Judgment was entered on 6th April, 2011 but also claimed damages for breach of contract and fraud. The Plaintiff did not file any reply to the Defence and did not deny therefore all these allegations levelled against it by the Defendant.

In the circumstances, can the Amended Defence be said to be a sham? Can it be said to raise no triable issues? Can the claim be said to be so clear? I think not. In my view the following issues arise for consideration.

- a) Did the Plaintiff deliver the poles in terms of the contract?
- b) Did the Plaintiff collude with the Defendant’s personnel to falsify documents on undelivered poles?
- c) Did the Plaintiff make deliveries to the Defendant the Defendant’s own poles?
- d) Did the Defendant make payment for undelivered poles?

e) Did the Plaintiff purport to deliver poles through means that were incapable to effect the purported deliveries?

f) In the circumstances, does the Defendant owe the Plaintiff the sum of US\$345,830.00 claimed?

To my mind, these issues have not and cannot be answered by the Affidavit evidence on record. Evidence must be called to resolve them. The Defence is clearly not a sham.

Accordingly, this court is not satisfied that the Plaintiff's motion dated 28th October, 2010 is meritorious and the same is accordingly dismissed with costs.

DATED and delivered at Nairobi this 23rd day of April, 2012.

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A. MABEYA
JUDGE